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NO._____

UNITED STATES SUPREME COURT
OCTOBER 1990 TERM

AMEDAY J. MIGLIORINI, PETITIONER, V. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, RESPONDENT.	WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(a) QUESTIONS PRESENTED FOR REVIEW

1. Whether a coal miner can be denied black lung benefits even though his physician and the physicians retained by the Department of Labor diagnose a totally disabling disease compatible with coal miner's pneumoconiosis.

2. Whether a diagnosis of a totally disabling disease compatible with coal miner's pneumoconiosis by physicians retained by the Department of Labor conclusively entitles a coal miner to black lung benefits.

3. Whether the use of a "substantial evidence" standard of review in black lung appeals is improper and denies due process and equal protection of the law.

4. Whether a reviewing court should be allowed to determine whether an Administrative Law Judge properly determined that a medical opinion was reasoned.

5. Whether a coal miner who is only able to carry on daily living activities and has been diagnosed with coal miner's pneumoconiosis is entitled to invoke the interim

presumption pursuant to 20 C.F.R. 727.203 (a)(1)-(4).

6. Whether the Department of Labor rebutted the interim presumption pursuant to 727.203(b)(1)-(4) by introducing the opinion of physicians who diagnosed a totally disabling disease compatible with coal miner's pneumoconiosis.

7. Whether the Court of Appeals erroneously determined that a coal miner did not have sixteen years of coal mine employment and did not raise the issue of the Administrative Law Judge's failure to re-evaluate his claim under 20 C.F.R. 410, Subpart D and 20 C.F.R. 718.

(b) LIST OF ALL PARTIES

Ameday J. Migliorini, Petitioner

Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondent

(c) TABLE OF CONTENTS

(3) The use of a "substantial evidence" standard of review in black lung cases is improper and also denies due process and equal protection of the law.

(4) The reviewing court should be allowed to determine whether an Administrative Law Judge properly determined that a medical opinion was reasoned.

(5) Migliorini was entitled to invoke the interim presumption and the Department of Labor failed to rebut the presumption.

(6) The Court of Appeals erroneously determined that Migliorini did not have sixteen years of coal mine employment and did not raise the issue of the Administrative Law Judge's failure to re-evaluate his claim under 20 C.F.R. 410, Subpart D and 20 C.F.R. 718.

TABLE OF AUTHORITIES

Hunter, Federal Trial Handbook, 73.1, 73.6, 73.8

(d) REFERENCE TO OPINION

Ameday J. Migliorini v. Director, Office of Workers' Compensation Programs, No. 89-1133, slip op (7th Cir. December 19, 1989

Ameday J. Migliorini v. Director, OWCP, 898 F. 2d 1292 (7th Cir. 1990)

(e) JURISDICTION OF THIS COURT

(i) The judgment sought to be reviewed is dated April 4, 1990, and was entered April 4, 1990.

(ii) An order denying a petition for rehearing is dated May 17, 1990, and was entered May 17, 1990.

(iii) Jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. 1254.

(f) CONSTITUTIONAL PROVISION

Fourteenth Amendment

See Appendix

(f.) REGULATIONS INVOLVED

20 C.F.R. 727.202 Definition of Pneumoconiosis:

For the purposes of the act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosisanthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by dust exposure in coal mine employment.

20 C.F.R. 727-203 Interim Presumption

(a) Establishing interim presumption. A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see 410.428 of this title);

(2) Ventilatory studies...

(3) Blood gas studies...

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(b) Rebuttal of interim presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see 410.412 (a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(g) STATEMENT OF THE CASE

Petitioner, Ameday J. Migliorini applied for benefits under the Black Lung Benefits Reform Act. His application was denied by the Office of Workers' Compensation Programs (OWCP) and he requested a hearing. Administrative Law Judge John C. Holmes conducted the

hearing.

At the hearing Migliorini testified that he worked sixteen years in coal mines (1923-1938), all underground, and never wore a respirator. He operated a machine cutting coal and dug coal by hand with a pick, sledge and wedge, both under unventilated conditions. After leaving the coal mines, Migliorini worked as a flagman, on construction jobs.

Migliorini further testified that he has coughing spells and gets dizzy. He stated that he gets shortwinded and is tired if he walks two blocks or climbs ten steps. He last worked in 1960 and never worked around any dust after leaving the coal mines.

Migliorini's son, William, testified that in the 1950's when his father was still a relatively young man, his father was unable to attend school functions of his children because of being unable to walk distances or climb steps. William observed his father to be in discomfort, even in those days. William also observed that his father could

only work ten or fifteen minutes in the garden and would have to sit and rest and regain his breath. His father would be coughing, hacking and spitting what appeared to be coal dust.

Migliorini submitted the medical report of Drs. Sturm and Conibear who diagnosed a condition compatible with coal miner's pneumoconiosis. Drs. Sturm and Conibear stated that Migliorini was only able to carry on normal daily living activities and that he had a work impairment and should not be exposed to irritant dust, fumes, gases, vapors and mists.

The Department of Labor introduced the medical reports of Dr. Kim who diagnosed chronic obstructive lung disease attributable to coal mining exposure. Dr. Kim stated that Migliorini could walk only one to two blocks, climb only one flight of stairs and lift no more than ten pounds.

The Administrative Law Judge denied Migliorini's application in November of 1984.

Migliorini appealed and the Benefits Review Board reversed and remanded and directed the Administrative Law Judge to address the physical limitations put on Migliorini by Dr. Kim.

On remand the Administrative Law Judge discredited Dr. Kim's opinion because Dr. Kim "gave no explanation for the limitations. Migliorini appealed again and the Benefits Review Board affirmed. Migliorini then appealed to the United States Court of Appeals for the Seventh Circuit.

The Court of Appeals found the Administrative Law Judge's conclusion that Migliorini "probably does not want to work now because of advanced age" unnecessarily speculative but nevertheless affirmed his decision.

(i) BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The Court of Appeals had jurisdiction to review the decision of the Benefits Review Board pursuant to Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c), as incorporated by section 422 (a) of the Black Lung Benefits Review Act,

as amended, 30 U.S.C. 932(a).

(j) ARGUMENT

(1) A COAL MINER SHOULD NOT BE DENIED BLACK LUNG BENEFITS WHEN HIS PHYSICIAN AND THE DEPARTMENT OF LABOR'S PHYSICIAN BOTH DIAGNOSE A TOTALLY DISABLING DISEASE COMPATIBLE WITH COAL MINER'S PNEUMOCONIOSIS

20 C.F.R. 727.203(a)(4) provides that a miner engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis if the documental opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment. Pneumoconiosis is defined by 20 C.F.R. 727.202 as a chronic dust disease of the lung and its sequlae, including respiratory and pulmonary impairment arising out of coal mine employment significantly related to or aggravated by dust exposure.

The Benefits Review Board has held that a medical opinion may be adequately documented with only a physical examination and a claim-

ant's symptoms and a work history. Hess v. Clinchfield Coal Co., 7 BLR 1-295, 1-296 (Ben. Rev.Bd. 1984); Buffalo v. Director, OWCP, 6 BLR 1-1164, 1-1165 (Ben.Rev.Bd. 1984).

Migliorini submitted the medical report of Drs. Sturm and Conibear from the University of Illinois which diagnosed chronic bronchitis and was compatible with coal miners' pneumoconiosis. The doctors stated that Migliorini had a work impairment from his condition and should not be exposed to irritant dust, fumes, gases, vapors and mists. In their opinion Migliorini was only capable of performing normal daily living activities.

To be totally disabled, Migliorini must be unable to do his usual coal mine job. 30 U.S.C. 902(f)(1)(A). The Court of Appeals stated that it could be inferred that Migliorini was totally disabled from the opinion of Drs. Sturm and Conibear, who concluded that Migliorini was capable of performing only normal daily living activities. Nevertheless, the Court of Appeals affirmed the deci-

sion of the Administrative Law Judge.

The Court of Appeals also criticized the Administrative Law Judge for failing to discuss the opinion of Drs. Sturm and Conibear that Migliorini had a work impairment as a result of his lung condition and that he should not be exposed to irritant dust,fumes, gases, vapors and mists. The Court of Appeals stated: "The ALJ should have addressed this work restriction. Nevertheless, the Court of Appeals affirmed the decision of the Administrative Law Judge.

Migliorini previously dug coal by hand and operated a machine cutting coal which would naturally create dust, fumes and gases. If Drs. Sturm and Conibear conclude that Migliorini has a work impairment from his lung condition, should avoid dust and fumes and is capable of performing only normal, daily living activities, then Migliorini is entitled to benefits. Evidence indicating the inability of a claimant to perform certain work tasks is probative of disability. Amax Coal

Company v. Director, 772 F.2d 304 (1985). Total disability is present when a claimant is prevented from engaging in gainful employment requiring the skills and abilities comparable to those of an employment in which he previously engaged. (Palmer Coking Coal v. Director, 720 F.2d 1054 (1983).

Not only does Migliorini's examining physician find him totally disabled, the physician retained by the Department of Labor comes to the same conclusion. The Department of Labor sent Migliorini to Dr. Kim to be examined. Dr. Kim first sent Migliorini to Dr. Lundstrom, a radiologist, whose X-rays indicated emphysema. Dr. Kim then diagnosed chronic obstructive lung disease attributable to coal mining exposure. Dr. Kim stated that Migliorini could walk only one to two blocks, climb only one flight of stairs and lift no more than ten pounds.

The Administrative Law Judge discounted Dr. Kim's report totally and improperly claimed that Dr. Kim did not explain his find-

ings.

Dr. Kim, like Drs. Sturm and Conibear, is a trained physician with many years of experience. Dr. Kim has the training,ability and experience to examine patients and make certain observations and findings in respect to that patient's state of well-being and physical limitations. Dr. Kim brings to his opinion specialized knowledge which laymen like the Administrative Law Judge lack.

There is no more explanation that Dr. Kim can give when he provides an opinion that Migliorini is incapable of walking more than two blocks or up more than one flight of stairs and incapable of lifting more than ten pounds. Dr. Kim's opinion is consistent with the opinion of Drs. Sturm and Conibear that Migliorini is only capable of carrying on normal, daily living activities. This obviously does not mean working in a coal mine. This means simply living and existing about the home.

The Court of Appeals stated that the

Administrative Law Judge's dismissal of Dr. Kim's report on remand was "unnecessarily laconic." Nevertheless, the Court of Appeals affirmed the decision of the Administrative Law Judge. Dr. Kim was hired by the Director and his positive finding of a totally disabling lung disease attributable to coal mining exposure, constitutes a judicial admission on the part of the Director on the ultimate issue in this case.

No doctor in this case offered an opinion that Migliorini was capable of returning to the mine or doing capable work. All doctors are in agreement that Migliorini is totally disabled as a result of working in a coal mine. Even the doctors hired by the Department of Labor agree. Nevertheless, the Administrative Law Judge's denial of benefits is allowed to stand based on his outrageous conclusion:

> Migliorini "probably does not desire to work now because of advanced age. The objective medical evidence indicates however that he could continue his regular coal mine work."

The Court of Appeals referred to this statement as unnecessarily speculative but nevertheless affirmed the decision of the Administrative Law Judge. The Court of Appeals made excuse after excuse for the disgraceful manner in which the Administrative Law Judge decided this case and should have reversed his decision and that of the Benefits Review Board. Migliorini is entitled to black lung benefits.

(2) A DIAGNOSIS OF A TOTALLY DISABLING DISEASE COMPATIBLE WITH COAL MINER'S PNEUMOCONIOSIS BY PHYSICIAN'S RETAINED BY THE DEPARTMENT OF LABOR CONCLUSIVELY ENTITLES A COAL MINER TO BLACK LUNG BENEFITS.

The Department of Labor retained Dr. Kim to evaluate Migliorini. Dr. Kim first sent Migliorini to Dr. Lundstrom whose x-ray examination disclosed emphysema. Dr. Kim then examined Migliorini and diagnosed chronic bronchitis and noted that Migliorini's clinical picture was compatible with coal miner's pneumoconiosis. Dr. Kim found that Migliorini was unable to walk more than two blocks, climb no more than one flight of

of stairs and could lift no more than ten pounds. Dr. Kim concluded that Migliorini had a work impairment from his condition and should not be exposed to irritant dust, fumes, gases, vapors and mists.

The Administrative Law Judge discredited Dr. Kim's opinion. The Court of Appeals stated that the Administrative Law Judge's dismissal of Dr. Kim's report was unnecessarily laconic. The Administrative Law Judge did not decide this case on the evidence but entirely on his own by concluding that Migliorini "probably does not desire to work now because of advanced age. The objective medical evidence indicates however that he could continue his regular coal mine work."

Dr. Kim was hired by the Director and his positive findings of a totally disabling lung disease attributable to coal mining exposure along with Dr. Lundstrom's x-ray findings are judicial admission which are binding on the Department of Labor. The Department of Labor is prohibited from attempting to im-

peach not only the opinion of Dr. Kim but also the opinion of Dr. Lundstrom, since Dr. Kim referred Migliorini to Dr. Lundstrom. The opinions and findings of Dr. Kim and Dr. Lundstrom are voluntary acknowledgments by the Department of Labor of the existence of Migliorini's total disability which are inconsistent with the defense of the Department of Labor. (Hunter, Federal Trial Handbook, 73.1, 73.6, 73.8). Migliorini is entitled to black lung benefits based on the reports of Drs. Kim and Lundstrom who were hired by the Department of Labor. 20 C.F.R. 727.203(1) and (4).

(3) THE USE OF A "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW IN BLACK LUNG CASES IS IMPROPER AND ALSO DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAW

The Court of Appeals states that the burden of proof is on Migliorini but does not use a "preponderance of the evidence" test to determine whether the Department of Labor disproved Migliorini's contention that Migliorini was entitled to black lung benefits.

The Seventh Circuit utilizes what it refers to as the "substantial evidence" test. The use of the word "substantial" is misleading because the evidence relied upon by the Court of Appeals in ruling in favor of the Department of Labor is not "substantial" at all in this case.

In this case the Court of Appeals is critical of the findings of the Administrative Law Judge but nevertheless affirms his opinion. The Court of Appeals states that the Administrative Law Judge should have discussed that part of the report of Drs. Sturm and Conibear where the physicians specifically consider Migliorini's potential employment. The Court of Appeals states that the dismissal of Dr. Kim's report by the Administrative Law Judge was "unnecessarily laconic". The Court of Appeals states that the Administrative Law Judge's conclusion that Migliorini "probably does not desire to work now because of advanced age" was "unnecessarily speculative".

The Court of Appeals relies on its own cases for the proposition that "substantial evidence may be less than the weight of the evidence but nevertheless may support a denial of black lung benefits". Delgado v. Bowen, 782 F. 2d 79, 87 (7th Cir. 1986); Smith v. Director, OWCP, 843 F.2d 1053, 1057 (7th Cir. 1988). This proposition is inherently contradictory, improper and denies Migliorini due process and equal protection of the law under the Fourteenth Amendment of the United States Constitution.

There is no reason why the standard of proof in a black lung case should be anything less than a preponderance of the evidence. The Administrative Law Judge ignored the manifest weight of the evidence before him which favored Migliorini and decided this case based on his own faulty conclusion:

> Migliorini "probably does not desire to work now because of advanced age. The objective medical evidence indicates however that he could continue his regular coal mine work."

All medical reports in this case are

consistent and conclude that Migliorini has a lung disease compatible with black lung disease and cannot go back to his old job of digging coal by hand or running a machine that cuts coal and creates dust, fumes and gases. The Department of Labor's own doctor, Dr. Kim, concludes that Migliorini is incapable of walking more than two blocks, walking up more than one flight of stairs or lifting more than ten pounds. Where is the "substantial" evidence which would deny Migliorini black lung benefits.

Webster defines "substantial" as solidly built or strong. The decision of the Administrative Law Judge is anything but "strong or solidly built" and, on the contrary, is weak, poorly written and not based on the evidence.

The "substantial evidence standard" of review is erroneous and unconstitutional and should never have been adopted by the Court of Appeals. The standard of review should be whether the decision of the Administrative

Law Judge is supported by the manifest weight of the evidence.

(4) THE REVIEWING COURT SHOULD BE ALLOWED TO DETERMINE WHETHER AN ADMINISTRATIVE LAW JUDGE PROPERLY DETERMINED THAT A MEDICAL OPINION WAS REASONED

20 C.F.R. 727.203(a)(4) provides that a miner who engaged in coal mine employment for at least ten years is presumed to be totally disabled due to pneumoconiosis if the documented opinion of a physician exercising reasonable medical judgment establishes the presence of a totally disabling respiratory or pulmonary impairment.

The Court of Appeals relies on its own cases for the proposition that it is up to the Administrative Law Judge to determine whether a medical opinion of a physician is reasoned. Arch Mineral Corp v. Office of Workers' Comp, 798 F.2d 215, 221 (7th Cir. 1987); Peabody Coal Co. v. Director, OWCP, 778 F.2d 358, 363 (7th Cir. 1985) Giving an Administrative Law Judge this much authority leads to what happened in this case. The

Administrative Law Judge ignores the medical opinions of Migliorini's physicians (Drs. Sturm and Conibear) and the medical opinions of the physicians of the Department of Labor (Drs. Kim and Lundstrom), all of which find a totally disabling lung disease compatible with coal miner's pneumoconiosis. What we end up with is the conclusion of the Administrative Law Judge unsubstantiated by the evidence that:

> Migliorini "probably does not desire to work now because of advanced age. The objective medical evidence indicates however that he could continue his regular coal mine work".

(5) MIGLIORINI WAS ENTITLED TO INVOKE THE INTERIM PRESUMPTION AND THE DEPARTMENT OF LABOR FAILED TO REBUT THE PRESUMPTION

Migliorini was entitled to invoke the interim presumption pursuant to 20 C.F.R. 727.203(a)(4) because of the opinions of Drs. Sturm, Conibear, Kim and Lundstrom. The Department of Labor was judicially bound by the opinions of Drs. Kim and Lundstrom because the Department of Labor hired Dr. Kim and Dr. Kim referred Migliorini to Lundstrom.

Because the Department of Labor was judicially bound by the opinions of Drs. Kim and Lundstrom, it was legally impossible for the Department of Labor to rebut the interim presumption. The Department of Labor had the burden of rebutting the presumption by producing a competent medical opinion demonstrating that Migliorini did not have pneumoconiosis. Ansel v. Weinberger, 529 F.2d 1034 (1976). The Department of Labor produced the medical opinion of Dr. Kim which confirmed that Migliorini is entitled to black lung benefits.

The Department also failed to demonstrate a possible explanation for Migliorini's impairment other than exposure to coal dust. The Department also failed to demonstrate that Migliorini was able to do his usual coal mine work or comparable work. Bethlehem Mines Corp v. Warmus, 578 F.2d 59 (1978).

(6) THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT MIGLIORINI DID NOT HAVE SIXTEEN YEARS OF COAL MINE EMPLOYMENT AND DID NOT RAISE THE ISSUE OF THE ADMINISTRATIVE LAW JUDGE'S FAILURE TO REEVALUATE HIS CLAIM UNDER 20 C.F.R. 410, Subpart D & 20 C.F.R. 718.

The Court of appeals states in a footnote that Migliorini did not raise the issue of the Administrative Law Judge's failure to evaluate his claim pursuant to 20 C.F.R. 410, Subpart D. On the contrary, one of Migliorini's two main arguments in his brief before the Court of Appeals was the following:

> The record establishes 16 years of coal mine work history which entitles the appellant to the presumption pursuant to 20 C.F.R. 410, Subpart D and 20 C.F.R. 718.

Migliorini filled out the forms supplied by the Department of Labor which are misleading and lead one to believe that only ten years of coal mine experience are required to obtain black lung benefits. Although Migliorini had sixteen years of coal mine employment, he initially confirmed that he had ten years of coal mine employment because that is all that the forms of the Department of Labor

called for. This discrepancy, which was not his fault, led the Administrative Law Judge improperly to find that he only had ten years of coal mine employment.

During the course of the hearing, the Administrative Law Judge improperly became an advocate on the part of the Department of Labor and questioned Migliorini about whether Migliorini worked each and every day of every year. Migliorini admitted that on occasion the mines shut down a few months during the year. As a result of this questioning, the Administrative Law Judge only gave Migliorini credit for ten years of coal mine employment rather than sixteen.

There is no administrative rule or case law which says a miner loses credit for a year of employment if he does not work every day each week during that year. The ruling by the Administrative Law Judge limiting Migliorini to ten years of credit was unsubstantiated by the evidence and by the law.

Likewise, the Administrative Law Judge

chose to ignore Migliorini's claim under 20 C.F.R. 410 Subpart D and 20 C.F.R. 718. This is not Migliorini's fault. The Administrative Law Judge obviously was going to do all that was necessary to deny Migliorini benefits. Migliorini did all he could to raise the issue on review before the Court of Appeals. The Seventh Circuit Court of Appeals has also improperly taken an unduly restrictive approach in reviewing black lung claims which should be overruled by this court.

WHEREFORE, the petitioner, AMEDAY J. MIGLIORINI, prays that this court grant this petition for writ of certiorari and reverse the decision of the Court of Appeals and grant him black lung benefits.

AMEDAY J. MIGLIORINI,
PETITIONER

BY_____
HIS ATTORNEY

APPENDIX FOLLOWS

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1133

AMEDAY J. MIGLIORINI,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondent.

Appeal from Benefits Review Board Agency

ARGUED DECEMBER 19, 1989—DECIDED APRIL 4, 1990

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Ameday J. Migliorini petitions this court for review of a decision by the Department of Labor's Benefits Review Board ("Board"), which affirmed the denial of his application for benefits under the Black Lung Benefits Reform Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* We affirm.

I

Migliorini is an 81 year-old miner with an eighth-grade education who worked in various underground coal mines from approximately 1923 to 1938. He applied for black

lung benefits on May 20, 1974; therefore, his claim is evaluated pursuant to the Department of Labor regulations at 20 C.F.R. § 727.200 *et seq.*[1] *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 137-38, (1987). Migliorini's application was denied by the Office of Workers' Compensation Programs (OWCP), and he requested a hearing.

ALJ John C. Holmes conducted a hearing on November 4, 1983.[2] The medical evidence before the ALJ consisted of a report of a November, 1980 examination by Dr. Richard D. Sturm and Dr. Shirley A. Conibear, which included a pulmonary function study, x-ray, EKG, and blood test; a report of a December 1979 x-ray, a re-reading of this x-ray, and an interpretation of an August 1979 x-ray by a "B" reader,[3] Dr. Reginald Green; a Department of Labor examination form completed in August 1979 by Dr. W. Y.

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[1] "Under 20 C.F.R. § 727.203(a)(1)-(4), a coal miner is presumed totally disabled due to pneumoconiosis if he has engaged in coal miner employment for at least ten years and can establish one of the following medical requirements:

(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishing the existence of pneumoconiosis,

(2) Ventilatory studies conforming to values set by regulation,

(3) Blood gas studies conforming to values set by regulation, or

(4) Other medical evidence, including the documented opinion of one physician exercising reasoned medical judgment, establishing the presence of a totally disabling respiratory or pulmonary impairment."

Meyer v. Zeigler Coal Co., No. 86-2292, slip op. at 2 (7th Cir. Jan. 31, 1990). Only the interim presumption is at issue in this case.

[2] One prior hearing was held in early 1983, but the transcription was lost, necessitating another hearing.

[3] A "B" reader is a radiologist who has taken a Department of Health and Human Services examination which demonstrates his proficiency in reading and classifying x-rays for presence of pneumoconiosis. *Freeman United Coal Mining Co. v. Benefits Review Board*, 879 F.2d 245, 246 n.2 (7th Cir. 1989) (citation omitted); *Smith v. Director, OWCP*, 843 F.2d 1053, 1055 n.4 (7th Cir. 1988) (citation omitted).

Kim; and a June 1974 pulmonary function study. ALJ Holmes also heard testimony from Migliorini and his son, and examined affidavits from coal miners who had worked with Migliorini.

The ALJ denied Migliorini's application in November, 1984. He held that the miner could not invoke the interim presumption of total disability due to pneumoconiosis because, although Migliorini worked for more than ten years in coal mines, the x-ray evidence did not disclose pneumoconiosis, and the physicians' opinions did not establish that Migliorini was totally disabled from pneumoconiosis. 20 C.F.R. § 727.203(a)(1), (4).[4] The ALJ also concluded that Migliorini was not eligible for black lung benefits under "the more stringent requirements" of 20 C.F.R. § 718.100 *et seq.* (the permanent Department of Labor regulations), or under the interim Department of Health, Education and Welfare regulations at 20 C.F.R. § 410.400 *et seq.*[5]

Migliorini appealed to the Board, and the Board remanded to the ALJ so that he could address the physical restrictions placed on the miner by Dr. W. Y. Kim pursuant to 20 C.F.R. § 727.203(a)(4). Dr. Kim estimated that Migliorini could walk one to two blocks, climb one flight of stairs, and lift ten pounds. The Board also ordered the ALJ to consider Migliorini's eligibility under 20 C.F.R. Part 410, Subpart D (410.400 *et seq.*) if he did not invoke the interim presumption under 20 C.F.R. § 727.203(a)(4). On remand, the ALJ discredited Dr. Kim's opinion because he gave "no explanation" for the limitations he placed on

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[4] Neither Migliorini's pulmonary function study nor his blood gas study qualified to establish a disabling lung impairment under 20 C.F.R. § 727.203(a)(2), (3).

[5] *See Mullins Coal Co.*, 484 U.S. at 138-39 for a discussion of the various regulations and the statutory authority on which they are based.

Migliorini.[6] The Board affirmed the ALJ's decision and Migliorini petitioned this court for review.

II

Although Migliorini seeks review of the Board's decision, "our task is to review the judgment of the ALJ, which was upheld by the Board." *Collins v. Old Ben Coal Co.*, 861 F.2d 481, 486 (7th Cir. 1988) (citing *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1137 (7th Cir. 1988)). Our initial question is whether the ALJ's decision was rational, supported by substantial evidence, and not contrary to law. *See* 33 U.S.C. § 921(b)(3) (1982), as incorporated by 30 U.S.C. § 932(a); *Pancake v. Amax Coal Co.*, 858 F.2d 1250, 1255 (7th Cir. 1988) (citing *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988)). "While we necessarily review the entire record, we neither decide the facts anew nor substitute our own judgment for that of the court." *Zettler v. Director, OWCP*, 886 F.2d 831, 834 (7th Cir. 1989) (per curiam).

A

Migliorini first argues that the ALJ's decision to credit him with less than 16 years of coal mine employment is erroneous and based on the ALJ's bias against him.[7] While

[6] The ALJ failed to discuss the miner's potential eligibility under 20 C.F.R. § 410, Subpart D on remand. The ALJ previously rejected Migliorini's claim under 20 C.F.R. § 410.400 (the interim HEW regulations) as well as 20 C.F.R. § 718.200 *et seq.* (the permanent Labor regulations). Migliorini did not raise the issue of the ALJ's failure to reevaluate his claim under these provisions on remand before the Board, and he does not raise the issue before this tribunal.

[7] The Director argues that the ALJ's computation that Migliorini worked ten years is harmless because, in any event, the miner would have had to prove total disability, which he did not do. In light of our conclusion that the ALJ's finding regarding Migliorini's length of employment is supported by substantial evidence, we do not reach the Director's argument.

we may consider one statement made by the ALJ unnecessarily speculative,[8] we nonetheless conclude that his computation of the years Migliorini spent in the mines is rational, not contrary to law, and supported by substantial evidence. *Collins*, 861 F.2d at 486; *Peabody Coal Co. v. Helms*, 859 F.2d 486, 489 (7th Cir. 1988).[9]

On his application for benefits, Migliorini claimed to have worked from 1923 to 1933. He submitted affidavits at that time evidencing only those ten years of employment.[10] At the hearing, however, the miner introduced into evidence other affidavits indicating that he worked in the mines until 1938, and testified that he worked from 1923 to 1938. When Migliorini's attorney asked him if he worked year-round, the miner replied that "[s]ometimes the mine shut down in April or May . . . until September." Upon further questioning by the ALJ,[11] Migliorini admitted that, although he normally worked five days a week and eight

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[8] The ALJ stated that the miner "probably does not desire to work now because of advanced age." But "the Act does not compensate disability due to age. . . ." *Meyer, supra*, n.1, slip op. at 10.

[9] For Migliorini to succeed on the issue of ALJ prejudice, he would have had to point to something outside the record indicating prejudgment or to have demonstrated that the ALJ's factual findings were undermined by his animus toward the miner. *See generally Pearce v. Sullivan*, 871 F.2d 61, 63-64 (7th Cir. 1989) (a social security disability case in which the claimant alleged that the ALJ was biased due to a statement made at the hearing indicating his impatience with the claimant).

[10] The Director of the Office of Workers' Compensation Programs (Director) did not contest the issue of length of employment before the hearing.

[11] The miner charges that this line of questioning reveals the ALJ's prejudice toward him. While it is impossible to discern from the transcript the tone with which the ALJ asked these questions, we think the need for the questions arose because Migliorini alleged longer mine employment at the hearing than he had previously. Rather than playing the role of advocate for the Director, the ALJ attempted to clear up a discrepancy in the record by inquiring about the miner's employment.

hours a day, he occasionally worked only two or three days a week. The miner repeated that the mine would shut down for several months during the summer and estimated that he worked approximately ten to twelve years on the whole.

The ALJ considered this evidence and credited the miner with "slightly in excess of 10 years" of coal mine employment. He emphasized that that was Migliorini's initial claim and that the later affidavits did not mention the summer months of inactivity, or less-than-forty-hour weeks, that Migliorini described at the hearing. Confronted with Migliorini's and the affidavits' contrary allegations, the ALJ weighed the evidence and found that Migliorini proved ten, but not sixteen years, of employment. As fact finder, the ALJ, not this court, reconciles conflicts in the record and assesses credibility. *Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988) (citing *Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 802 (7th Cir. 1977)). Because the ALJ's computation is rational, supported by substantial evidence, and not contrary to the law, his factual determination withstands review. *Amax Coal Co. v. Fagg*, 865 F.2d 916, 917 (7th Cir. 1989) (citing statutory authority governing standards of review).

B

We turn next to Migliorini's second argument—that the record "was sufficient" to invoke the presumption and that the Director failed to rebut the presumption. We do not reach the second part of this argument because, under our standard of review, whether the evidence "was sufficient" to invoke the presumption is not the issue. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Richardson v. Perales*, 402 U.S. 389, 401 (1971), and may be less than the weight of the evidence. *See Delgado v. Bowen*, 782 F.2d 79, 82 (7th Cir. 1986) (citing *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)). Thus, a record may include substantial evidence to support granting *or* denying black lung benefits. *Smith*, 843 F.2d at 1056.

Migliorini argues (in only one sentence) that because a Dr. Lundstrom read a December 1979 x-ray as indicating emphysema, the ALJ should have invoked the interim presumption of total disability pursuant to 20 C.F.R. § 727.203(a)(1) (the presumption may be invoked if an x-ray "establishes the existence of pneumoconiosis"). Dr. Lundstrom's qualifications are not known. Dr. Reginald Green, a "B" reader, interpreted this x-ray as negative (0/0) for pneumoconiosis, but showing emphysema. *See* 20 C.F.R. § 718.201(b) (an x-ray classified as 0/0 "does not constitute evidence of pneumoconiosis"). Dr. Green considered the August 1979 x-ray unreadable. The miner fails to respond to the assertion that "emphysema" is not "pneumoconiosis." *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1231 (Ben.Rev.Bd. 1984) (an x-ray film that reveals evidence of emphysema, but is rated 0/0 for pneumoconiosis, is negative for pneumoconiosis under 20 C.F.R. § 727.203(a)(1)). Substantial evidence supports the ALJ's finding that Migliorini could not invoke the presumption based on this x-ray.

We turn next to Migliorini's assertion that the ALJ should have invoked the presumption pursuant to 20 C.F.R. § 727.203(a)(4), which permits invocation if "a documented opinion of a physician exercising reasoned medical judgment establishes the presence of a totally disabling respiratory or pulmonary impairment." The Board has held that a medical opinion may be adequately documented with only a physical examination and a claimant's symptoms and work history. *See, e.g., Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (Ben.Rev.Bd. 1984); *Buffalo v. Director, OWCP*, 6 BLR 1-1164, 1-1165 (Ben.Rev.Bd. 1984). A reasoned medical opinion rests on documentation adequate to support the physician's conclusions. *Hess*, 7 BLR at 1-296; *Luther v. Director, OWCP*, 7 BLR 1-117, 1-119 (Ben.Rev.Bd. 1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1293 (Ben.Rev.Bd. 1984). Whether an opinion is reasoned is the ALJ's decision. *Arch Mineral Corp. v. Office of Workers' Comp.*, 798 F.2d 215, 221 (7th Cir. 1987) (quoting *Peabody Coal Co. v. Director, OWCP*, 778 F.2d 358, 363 (7th Cir. 1985)).

The miner claims that the opinions of Drs. Richard E. Sturm and Shirley C. Conibear, and Dr. Kim, establish that he is totally disabled by a pulmonary impairment. Migliorini first avers that the ALJ discredited the opinions of Drs. Sturm and Conibear, who examined him once on November 20, 1980. We disagree. The ALJ's decisions make clear that he credited the physicians' conclusion as supported by the objective medical evidence; the ALJ thus found their report reasoned. In his second decision, the ALJ specifically gave greater weight to the opinions of Drs. Sturm and Conibear than to Dr. Kim's opinions. *Meyer v. Zeigler Coal Co.*, No. 86-2292, slip op. at 9-10, (7th Cir. Jan. 31, 1990) (the ALJ reasonably gave greater weight to the opinion of a physician that was based on objective medical testing as well as an examination and history).

The physicians diagnosed chronic bronchitis and noted that Migliorini's clinical picture (mild obstructive defect as shown on a pulmonary function test, "slowly worsening exertional dyspnea," hyper-inflated chest revealed by x-ray, and sixteen years' underground coal mine experience) was "compatible with coal workers' pneumoconiosis." The doctors opined that Migliorini "ha[d] a work impairment from his condition, in that he should not be exposed to irritant dust, fumes, gases, vapors, [and] mists," but also considered him "able to carry on normal activities of daily limits."[12]

The ALJ interpreted the latter statement by Drs. Sturm and Conibear as evidence that they did not find Migliorini totally disabled; rather, he inferred that Migliorini's lung condition did not interfere with his normal life. To be "totally disabled," Migliorini must be unable to do his usual coal mine job or another gainful, comparable job. 30 U.S.C. § 902(f)(1)(A). The physicians' statement that Migliorini could do normal, daily activities is silent on the exact issue

[12] This last word is probably mistyped and should read "living." The physicians were referring to Migliorini's capacity to function daily.

of whether or not the miner could perform his usual coal mine work; the statement can be read as either supporting or not supporting a finding of total disability. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 502 (7th Cir. 1989) (comparing the "silent" record in *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985) and the record in *Burns*). However, pursuant to 20 C.F.R. § 727.203(a)(4), "the requisite medical evidence must itself establish the claimants' disability." *Zettler*, 886 F.2d at 837 (citing *Plutt v. Benefits Review Bd.*, 804 F.2d 597 (10th Cir. 1986)). Therefore, to support directly Migliorini's claim, the physicians' opinion must be read as stating that *at most* the miner can perform *only* normal activities of daily living. While such an inference could be made, the ALJ did not make it. He stated that Drs. Sturm and Conibear concluded that Migliorini's respiratory condition "does not impair normal activity," and we are constrained to uphold his inference. A reviewing court cannot reject an inference made by an ALJ "merely because it finds the opposite conclusion more reasonable." *Burns*, 855 F.2d at 501; *see also Helms*, 859 F.2d at 489.

The ALJ's failure to discuss the portion of the report where the physicians specifically consider Migliorini's potential employment is not helpful to a reviewing tribunal. Drs. Sturm and Conibear opined that Migliorini "ha[d] a work impairment from [his lung] condition, in that he should not be exposed to irritant dust, fumes, gases, vapors, [and] mists . . . ." The ALJ should have addressed this work restriction. However, the ALJ's omission does not warrant remand or reversal. The Board has held that a physician's prohibition against work in dusty environments is not tantamount to his concluding that the miner is "totally disabled." *See Neace v. Director, OWCP*, 867 F.2d 264, 268 (6th Cir. 1989), *reh'g. denied*, 877 F.2d 495 (6th Cir. 1989) (two physicians cautioned the miner "against further dust exposure, [but] their opinions [did] not, as such, constitute substantial evidence that Neace [was] necessarily totally disabled from his usual coal mine work") (citation omitted); *Coleman v. Harman Mining Corp.*, 6

BLR 1-601, 1-604 (Ben.Rev.Bd. 1983); *New v. Director, OWCP*, 6 BLR 1-597, 1-600 (Ben.Rev.Bd. 1983).

The regulation requires that the medical opinion must establish that the claimant is totally disabled. The burden of proof lies with Migliorini. 20 C.F.R. § 727.203(a)(4). The Act states that a miner is totally disabled when "pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged . . . ." 30 U.S.C. § 902(f)(1)(A). The physicians' work restriction did not address Migliorini's "skills and abilities"; rather, the physicians limited Migliorini's work environment. Thus, the statement is not dispositive of the issue of total disability.

We now turn to the miner's contention that Dr. Kim's report supports his entitlement to benefits. The ALJ stated that he did not grant Dr. Kim's opinion "much probative value" because the physician offered "no explanation how he arrived at his finding of limitations of walking 2 blocks on level and one flight of stairs."[13] Migliorini argues that the physician did not have to provide his reasoning and that such reasoning is part and parcel of a physician's expertise.

The ALJ's dismissal of Dr. Kim's report on remand was unnecessarily laconic. However, we cannot say that the ALJ rejected outright Dr. Kim's report as undocumented or unreasoned. The ALJ, as trier of fact, could rationally give greater weight to the report of Drs. Sturm and Conibear, which was based on not only a physical examination, symptoms, and patient history, but on an x-ray, a pulmonary function study, and blood gas readings. *Meyer*, slip op. at 9-10; *Smith v. Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988) (medical witness credibility is a question for the trier of fact, who need not accept a doctor's

[13] The Board had ordered the ALJ to credit or discredit the report and then compare it with the report of Drs. Sturm and Conibear on remand.

conclusions, but can "weigh the medical evidence and draw his own inferences") (quoting *Peabody Coal Co. v. Director, OWCP*, 560 F.2d 797, 802 (7th Cir. 1977)). Dr. Kim based his opinion only on a physical examination, symptoms and work history. Thus, while it is a documented opinion, it is not as well supported, and therefore as reasoned, as Drs. Sturm and Conibear's report.[14]

In sum, the ALJ, as trier of fact, reasonably relied on the report of Drs. Sturm and Conibear, which he interpreted as failing to establish definitely that Migliorini was totally disabled due to pneumoconiosis. His decision to deny black lung benefits was rational, supported by substantial evidence, and not contrary to law.

Conclusion

Given the deference afforded the fact-finder, and a claimant's burdens of proof and persuasion on the interim presumption, we must affirm the decision of the Board.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[14] The Board has previously held that the physical restrictions placed on the miner by Dr. Kim both can, and cannot, support an ALJ's decision to invoke the interim presumption pursuant to 20 C.F.R. § 727.203(a)(4). *Compare Parino v. Old Ben Coal Co.*, 6 BLR 1-104, 1-107 (Ben.Rev.Bd. 1983), *with Bray v. Director, OWCP*, 6 BLR 1-400, 1-402 (Ben.Rev.Bd. 1983) (citing *Peabody Coal Co. v. Director, OWCP*, 581 F.2d 121 (7th Cir. 1978)).

USCA 79004—Midwest Law Printing Co., Inc., Chicago—4-4-90—500

UNITED STATES COURT OF APPEALS 12

For the Seventh Circuit
Chicago, Illinois 60604

May 17 ,1990

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

AMEDAY J. MIGLIORINI, Petitioner,	) Appeal from the) Benefits Review) Board Agency
No. 89-1133 v.	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Respondent.	)

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc in the above-entitled cause filed by petitioner on April 18, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby,DENIED.

BENEFITS REVIEW BOARD
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 87-870 BLA-R
OWCP No. 354-07-5204

AMEDAY J. MIGLIORINI)
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF)
WORKERS' COMPENSATION)
PROGRAMS, UNITED STATES)
DEPARTMENT OF LABOR)
)
Respondent) DECISION AND ORDER

PER CURIAM:

Claimant appeals the Decision and Order on Remand (81-BLA-3806) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 et seq. In his original Decision and Order the administrative law judge found slightly more than ten years of coal mine employment, but found the evidence insufficient to establish invocation of the interim

presumption pursuant to 20 C.F.R. 727.203 (a)(1)-(4). The administrative law judge also found that claimant was ineligible for benefits pursuant to the permanent criteria of 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. Part 718. Accordingly, benefits were denied. Claimant then appealed, stating that the administrative law judge erred in finding fewer than sixteen years of coal mine employment and erred in failing to find invocation under subsections (a)(1) and (a)(4). The Board affirmed the administrative law judge's finding regarding length of coal mine employment and affirmed the administrative law judge's finding that the medical opinion of Drs. Sturm and Conibear, claimant's Exhibit 1, does not support invocation under subsection (a)(4). The Board remanded the case, however, for the administrative law judge to reconsider Dr. Kim's report, Director's Exhibit 9, because Dr. Kim's opinion that claimant's obstructive pulmonary disease limited claimant's ability to walk, climb and

lift, if fully credited, could support invocation under subsection (a)(4). If, on remand, the administrative law judge again found no invocation, he was instructed to consider the evidence pursuant to Part 410, Subpart D.

In his Decision and Order on Remand, the administrative law judge again found that the interim presumption was not invoked pursuant to subsection (a)(4), and that even if the presumption has been invoked, it would have been rebutted pursuant to 20 C.F.R. 727.203 (b)(2) or (b)(3). Accordingly, the administrative law judge again denied benefits. On appeal, claimant contends that the administrative law judge is biased and prejudiced against claimant, that the administrative law judge erred in not finding sixteen years of coal mine employment, that Dr. Lundstrom's x-ray report diagnosing suggestive signs of chronic obstructive pulmonary disease supports invocation under subsection (a)(1), that the medical reports of Drs. Sturm and Conibear and of Dr. Kim support invocation

under subsection (a)(4), and that the Director, Office of Workers' Compensation Programs (the Director), has failed to rebut the presumption, thereby entitling claimant to benefits. The Director, in a response brief, urges affirmance of the administrative law judge's decision.

The Board's scope of review is defined by by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. 921(b)(3), as incorporated by 30 U.S.C. 932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Initially, we reject claimant's allegation that the administrative law judge was biased and prejudiced against claimant. Although claimant complains that the administrative law judge's questioning of claimant elicited responses unfavorable to claimant's claim, and that the administrative law judge

found the objective evidence did not favor claimant, claimant has set forth no factual grounds to support his allegation, nor can any be discerned from the record. See Zamora v. C.F.& I Steel Corp., 7 BLR 1-568 (1984).

Secondly, we decline to address claimant's arguments regarding the length of his coal mine employment, and the administrative law judge's failure to invoke the interim presumption pursuant to subsection (a)(4) as a matter of law based upon the medical report of Drs. Sturm and Conibear diagnosing a chronic obstructive pulmonary disease. Claimant raises the same arguments which the Board considered and addressed in its prior decision, which we conclude constitutes the law of the case, and governs our determination herein. See Bridges v. Director, OWCP, 6 BLR 1-988 (1984); Dean v. Marine Terminals Corp., 15 BRBS 394 (1983).

Furthermore, we reject claimant's argument that invocation was established under subsections (a)(1) and (a)(4). The adminis-

trative law judge properly noted that the December 27, 1979, x-ray, which was interpreted by Dr. Lundstrom, whose credentials are not in evidence, as showing scattered calcification in both hila was reread as negative for the existence of pneumoconiosis by Dr. Greene, a "B" reader,[1] but that even without Dr. Greene's rereading, there was no positive x-ray evidence of record of pneumoconiosis and therefore, invocation was not established at subsection (a)(1). Decision and Order at 3; Director's Exhibits 11-15. The administrative law judge's finding is rational and based on substantial evidence, and is therefore, affirmed. See 20 C.F.R. 727.203(a)(1), 727.206 and 410.428; Canton v. Rochester & Pittsburgh Coal Co., 8 BLR 1-475 (1986); Marra v. Consolidation Coal Co., 7 BLR 1-216 (1984). In his Decision and Order on Remand, the administrative law judge noted that since Dr. Kim failed to explain his findings of physical limitations, Dr. Kim's opinion was given less weight than the opinion of Drs.

Sturm and Conibear, which was supported by the objective evidence, and therefore invocation under subsection (a)(4) was not established. Decision and Order on Remand at 1; Director's Exhibit 9; Claimant's Exhibit 1. The administrative law judge could properly accord less weight to a physician's opinion which was not adequately supported by its underlying documentation. See Peskie v. United States Steel Corp., 8 BLR 1-126 (1985); Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Buffalo v. Director, OWCP, 6 BLR 1-1164 (1984). Moreover, contrary to claimant's contention, lay testimony regarding the extent of claimant's disability is not the type of evidence which may be considered pursuant to subsection (a)(4). See Sabett v. Director, OWCP, 7 BLR 1-299 (1984); New v. Director, OWCP, 6 BLR 1-597 (1983). We, therefore, affirm the administrative law judge's finding that the interim presumption was also not invoked pursuant to subsection (a)(4).[2]

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[1]A (B) reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. See Roberts v. Bethlehem Mines Corp., 8 BLR 1-211 (1985).

[2]Since we affirm the administrative law judge's finding that the interim presumption was not invoked under 20 C.F.R. 727.203(a), we need not address claimant's arguments concerning rebuttal. See Coen v. Director, OWCP, 7 BLR 1-30 (1984).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/S/ Roy P. Smith
ROY P. SMITH, Acting Chief
Administrative Appeals
Judge

/S/ Nancy S. Dolder
NANCY S. DOLDER
Administrative Appeals
Judge

/S/ Glenn R. Lawrence
GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated this 23rd day
of November 1988

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	Date Issued:
AMEDAY J. MIGLIORINI	Feb 27, 1987
Claimant-Petitioner	Case No.81-BLA-3806
v.	BRB No. 84-357-BLA
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS	OWCP No. 354-07-5204
Party In Interest	

DECISION AND ORDER

On March 23, 1984, I issued a Decision and Order denying benefits. On November 17, 1986,[1/] the Benefits Review Board vacated my decision and remanded the matter on the basis that I failed to discuss "... the limitations specified by Dr. Kim, but concluded that the doctor had not found Claimant impaired by a pulmonary disease." The Board further found Claimant impaired by a pulmonary disease."

The Board further found that should the limitations described by Dr. Kim be found to be credible his report should be compared to Drs. Sturm and Conibear and determine whether a totally disabling respiratory impairment is established pursuant to subsection (a)(4).

Conclusion

Dr. Kim gives no explanation how he arrived at his findings of limitations of walking 2 blocks on level and one flight of stairs. I, therefore, don't give his opinion much probative value. Drs. Strum and Conibear, on the other hand, found Claimant able to carry on normal activities. The objective medical testing supports such a conclusion. Claimant at the time of testing was 72. He left the coal mines in 1938. I find the presumption is not triggered under 20 C.F.R. 727.204(a)(4). Even, arguendo, were it triggered it would be rebutted under (b)(2) and/or (b)(3).

My Decision and Order of January 4, 1984 denying benefits is affirmed.

/S/ John C. Holmes
JOHN C. HOLMES
Administrative Law Judge

JCH/mlc

1/ The matter was actually forwarded under date of February 17, 1987 to the Office of Administrative Law Judge.

Benefits Review Board
1111 20th St., N.W.
Washington, D.C. 20036

BRB No. 84-357 BLA
OWCP No. 354-07-5204

AMEDAY J. MIGLIORINI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND
Party-in-Interest	)	ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor

Kenneth A. Kozel (Petz and Kozel), La Salle, Illinois, for claimant.

Diane Hodes (George R. Salem, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and MARCELLINO, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-3806) of Administrative Law Judge John C. Holmes denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 et seq. The administrative law judge found that claimant had been employed in coal mine work slightly in excess of ten years, and that the evidence of record was insufficient to invoke the interim presumption pursuant to 20 C.F.R. 727.203(a). The administrative law judge also found that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Claimant contests the denial of the subsection (a)(4) interim presumption and

the finding of only ten years of coal mine employment.

The Board's scope of review is defined by statute. The Decision and Order of the administrative law judge must be affirmed if it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. 921(b)(3), as incorporated by 30 U.S.C. 932 (a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Inasmuch as claimant's argument regarding the administrative law judge's finding of length of coal mine employment does not affect consideration of the claim under Section 727.203, claimant's subsection (a)(4) contentions will be addressed first. Claimant contends that the subsection (a)(4) presumption is invoked by the medical reports of Drs. Sturm and Conibear and of Dr. Kim.

Dr. Sturm and Dr. Conibear diagnosed chronic obstructive pulmonary disease and found claimant's condition to be compatible

with pneumoconiosis. The doctors' recommendation that claimant not be exposed to "irritant dust" does not, however, constitute a diagnosis of total disability. Cl.Ex. 1; see New v. Director, OWCP, 6 BLR 1-597, 1-600 (1983). The doctors further noted that claimant is able to carry on "normal activities of daily limits." Cl.Ex. 1. The administrative law judge's finding that this report does not diagnose a totally disabling impairment and is insufficient to establish invocation pursuant to subsection (a)(4) is rational and based on substantial evidence, and is therefore affirmed.

Dr. Kim diagnosed obstructive pulmonary disease and indicated that claimant's pulmonary disease limited claimant's ability to walk, climb, and lift. Dr.Ex. 9. The administrative law judge did not discuss the limitations specified by Dr. Kim, but concluded that the doctor had not found claimant impaired by his pulmonary disease. Decision and Order at 4. The administrative law judge

erred in failing to discuss this aspect of Dr. Kim's report, see Parsons v. Director, OWCP, 6 BLR 1-272, 1-276 (1983), and his subsection (a)(4) finding therefore must be vacated. If, on remand, the administrative law judge fully credits Dr. Kim's report, he must then compare the limitations specified by Dr. Kim with the exertional requirements of claimant's usual coal mine employment. Dolzanie v. Director, OWCP, 6 BLR 1-865, 1-867 (1984). See also Bartley v. L & M Coal Co., 7 BLR 1-243 (1984). The administrative law judge must then weigh Dr. Kim's report against the report of Drs. Sturm and Conibear to determine whether a totally disabling respiratory impairment is established pursuant to subsection (a)(4).

Should the administrative law judge find that the subsection (a)(4) presumption is not invoked on remand, he must then determine whether Dr. Kim's report establishes entitlement pursuant to Part 410, Subpart D. Because of the availability under Part 410 of pre-

sumptions based on the length of claimant's coal mine work history, we now address claimant's contention that the record establishes sixteen years of coal mine employment. The administrative law judge found that claimant had established only slightly more than ten years of actual coal mine employment. This finding is supported by the record. Claimant testified at the hearing that, although his coal mine employment spanned a sixteen-year period from 1923 to 1938, the time he actually was engaged in coal mine employment accounted for only ten to twelve of those years. Transcript at 13-14. The administrative law judge's finding of slightly more than ten years of coal mine employment is rational and based on substantial evidence, and is therefore affirmed. See Tackett v. Director, OWCP, 6 BLR 1-839 (1984); Harrell v. Pittsburg & Midway Coal Co., 6 BLR 1-961 (1984).

Accordingly, the Decision and Order of the administrative law judge denying benefits

is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

/S/ R P Smith
ROY P. SMITH
Administrative Appeals Judge

/S/ Nancy S Dolder
NANCY S. DOLDER
Administrative Appeals Judge

/S/ Frank J. Marcellino
FRANK J. MARCELLINO
Administrative Law Judge

*Sitting as a temporary Board Member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. 921(b)(5) (West 1986).

Dated this 17th day
of November 1986

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th St.,N.W.
Washington, D.C. 20036

In the Matter of AMEDY J. MIGLIORINI Claimant v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party In Interest	Date Issued: Jan 4, 1984 Case No. 81-BLA-3806 OWCP No. 354-07-5204

DECISION AND ORDER - DENYING BENEFITS

This proceeding arises under the provisions of the Black Lung Benefits Reform Act of 1977 (the Act) which substantially amends the Federal Coal Mine Health and Safety act of 1969 (30 U.S.C. 901, et seq.). In accordance with the Reform Act and the regulations issued thereunder, this case was referred by the Deputy Commissioner, Office of Workers' Compensation Programs, U.S. Department of Labor, for formal hearing in order to determine claimant's eligibility for compensation based on total disability due to pneumoconiosis.

After due notice a hearing was held in Peoria, Illinois on November 4, 1983, 1/ at which both parties were afforded a full opportunity to be heard, present evidence, examine and cross-examine witnesses and make oral arguments. My decision and order is based upon this entire record.

1/ A hearing was originally held on February 4, 1983; however, the transcript was never forwarded to me, requiring a new hearing.

Background and History

The Claimant, Amedy J. Migliorini born July 25, 1908 after an 8th grade education first entered the nation's coal mines in 1923. He worked for several coal companies in various jobs, underground under dusty conditions. Claimant listed on his application that he last worked in the coal mines in 1940 when they shut down. On his claim, Claimant listed 10 years of Coal mine experience; he submitted affidavits from fellow employees that he had worked from 1923 until 1938. Most of his employment was before Social Security records were kept. The affidavits while they give years that he worked in the mines are not specific as to the regularity. Claimant filed for benefits on May 20, 1974. He has one dependent, his wife. After leaving the mines, Claimant worked in mainly construction and as a janitor in the warehouse for a zinc works.

Medical Evidence

X-ray results were: Dr. C. Lindstrom, December 27, 1979; lungs appear aerated,

scattered calcifications in both hila; suggestive signs of chronic pulmonary obstructive disease; Dr. Weidenheim, June 11, 1974, early generalized emphysema (boxes for small opacities left blank); Dr. Reginald Greene, a "B" reader, reread the December 27, 1979 x-ray as 0/0 pneumoconiosis, emphysema, tuberculosis, pleural thickening in walls diaphragm; (signature illegible), Univ. of Illinois Hospital, November 20, 1980, normal, R/O COPD clinically.

Pulmonary function tests results were:

DATE	Physician	Ht.	FBV1	MVV	FVC	Effort
6/11/74	Radelko(?)	70"	3.590	128		Good
3/4/81	Conibear Sturm		4% loss		11% loss	
11/24/80	Univ. of Illinois Hospital		2.85	69	3.89	Good
	(after bronchodilator)		3.15	117	4.25	

DATE	Physician	Tracing	Comment
6/11/74	Radelko(?)	Yes	
3/4/81	Conibear Sturm		Mild Obstructive

Date	Physician	Tracing	Comment
11/24/80	Univ. of Illinois Hospital (after bronchodilator)		Mild Obstructive

Blood/gas test results were: August 14, 1979, Illinois Valley Community Hospital, pCO2-35.2, PO2-100.6; Drs. Sturm and Conibear, March 4, 1980, PCO2-40, pO2-100.6; Drs. Sturm and Conibear, March 4, 1980, PCO2-40, pO2-86; November 24, 1980, University of Illinois Hospital, PCO2-40, pO2-86.

Dr. Y. Kim, August 21, 1979 reported: history of pleurisy, wheezing, high blood pressure. Smokes 1 cigar per day. A-P diameter moderately to markedly increased. Limitations, 1-2 blocks walking, 1 flight of stairs, lifting 10 lbs. Diagnosis: 1, chronic obstructive lung disease; 2 hypertension. Related to coal mine employment, based on long years exposure to coal mining and findings of chronic obstructive pulmonary disease.

Drs. Richard E. Sturm and Shirley A.

Conibear, March 4, 1981, reported on physical of November 20, 1980: chronic cough five years; exertional dyspnea; wheezing. Hypertension, 2 years. Chest: hyper-expanded, hyper-resonant, good air exchange. X-ray showed possible diagnosis of COPD. Pulmonary function tests interpreted as a mild obstructive defect with hyperventilation and no response to bronchodilators. Impressions: (1) Chronic Obstructive pulmonary disease. Specifically, chronic bronchitis, by history of sputum production. Never smoked. Coal miner 16 years. Picture compatible with pneumoconiosis. Work impairment from this condition. Hearing loss. Hypertensive, well controlled. Allergic to penicillin by history. Symptoms of prostatic hypertrophy. Pulmonary function indicates 4% loss in FEV1 and 11% in FVC. Able to carry on normal activities.

Claimant testified that he gets short of breath; he spits up phlegm. He gets dizzy spells; doesn't do much. His son, William, testified that his father can't do the things,

such as sports and gardening that he used to do. Can hardly mow the lawn. (Tr. 15-17.)

Conclusions

Claimant has labored in the coal mines slightly in excess of 10 years. In order to benefit from the presumption contained in 20 C.F.R. 727.203 that he is totally disabled by pneumoconiosis, he must meet any one of the four criteria contained therein. I find he meets none of them.

Of the four x-ray readings [2]/ entered into evidence, none are positive for pneumoconiosis. Interestingly all four find emphysema or, chronic obstructive lung disease. Since claimant did not smoke cigarettes, often the cause of emphysema, I have some question as to these readings. Nevertheless, the results are insufficient to trigger the presumption under 20 C.F.R. 727.203 (a)(1).

The three pulmonary function tests show little or no impairment of lung function.

2/ Dr. Reginald Greene's rereading is accepted into evidence since the original reader was not demonstrated to be a board certified or board eligible reader. My conclusions are

the same with or without Dr. Greene's re-reading.

The three pulmonary function tests show little or no impairment of lung function. Although Dr. Radelko's report is somewhat out dated, having been taken in 1974, I specifically note that Claimant at that time was 66 years of age and had last labored in the mines over 30 years previously. Any lung impairment due to coal dust exposure should readily have shown up at that time. Though not recognized under Part 727, the Part 718 regulations do take into account advancing age. Claimant's results are the more remarkable because of his advanced age at the time. His latest test shows little impairment. The 1980 test shows results after bronchodilator well in excess of the guidelines. The results clearly do not qualify under (a)(2). Moreover, only Dr. Radelko's meets the quality control standards (20 C.F.R. 727.206).

Similarly the blood/gas test results do not meet the standards established under (a)(3).

Dr. Kim makes a finding of chronic obstructive lung disease which he relates to coal dust exposure based on "long years exposure to coal mining." However, he does not conclude that Claimant is impaired, let alone disabled by it. Drs. Sturm and Conibear, who examined Claimant at age 62, only tentatively conclude that Claimant has chronic pulmonary disease compatible with pneumoconiosis. They conclude that it does not impair normal activity; pulmonary function and blood/bas tests are normal. Moreover, their findings are based on 16 years coal mine history, which is questionable.

Claimant, thus does not meet the (a)(4) criteria.

Based on the totality of the evidence, Claimant has not demonstrated a significant, if any, lung impairment. While he has been diagnosed as having a chronic obstructive lung disease, a causal relationship to his coal dust exposure as a miner for a relatively short period of time has not been made.

Claimant left the mines in 1938 (or at the very latest 1940) when they shut down and he has since followed other work. He probably does not desire to work now because of advanced age. The objective medical evidence indicates, however, that he could continue his coal mine work.

Thus Claimant would not be eligible under the more stringent requirements of part 718 or Part 410.

In reaching my conclusions, benefits of doubt have been resolved in favor of Claimant (Wheatley v. Adler, Deputy Commissioner, et al, 407, F 2d 307 (D.C. Cir. 1968).

/S/ John C. Holmes
Administrative Law Judge

JCH/mlc

CONSTITUTIONAL PROVISION

Fourteenth Amendment to the
United States Constitution

Section 1. All persons born or natutalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.